

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

_____	)	
PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	No. S147335
	)	
v.	)	(San Bernardino Co.
	)	Superior Court No.
LOUIS MITCHELL, JR.,	)	FSB 051580)
	)	
Defendant and Appellant.	)	
_____	)	

SUPREME COURT  
FILED

SEP 26 2016

Appeal from the Judgment of the Superior Court  
of the State of California for the County of San Bernardino Frank A. McGuire Clerk

HONORABLE BRIAN S. McCARVILLE, JUDGE

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DEATH PENALTY



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Defendant and Appellant.	)	
_____	)	

**APPELLANT’S REPLY BRIEF**

**INTRODUCTION**

In this brief, appellant Louis Mitchell, Jr. (“Mitchell”) replies to contentions made by respondent (“the State”) that necessitate an answer in order to present the issues fully to this Court. However, he does not reply to arguments that are adequately addressed in his opening brief. In particular, Mitchell does not present a reply on Argument III, his claim of cumulative prejudice resulting from the instructional errors at the guilt phase and Argument VI, his claim of cumulative prejudice based on the cumulative effect of all the errors. The failure to address any particular argument, sub-argument or assertion made by the State, or to reiterate any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by Mitchell (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been

adequately presented and the positions of the parties are fully joined. The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.

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## ARGUMENT

### I.

#### **THE UNANIMITY-OF-DOUBT REQUIREMENT IN CALJIC NO. 8.71 AND CALJIC NO. 8.72 IMPERMISSIBLY AND PREJUDICIALLY SUBVERTED THE REASONABLE DOUBT STANDARD WHICH LOWERED THE STATE'S BURDEN OF PROOF FOR MURDER AND FIRST DEGREE MURDER**

In accordance with CALJIC Nos. 8.71 and 8.72, the trial court instructed the jury on how to respond to doubts regarding whether appellant was guilty of the lesser or greater homicide offenses. The version of CALJIC Nos. 8.71 and 8.72 given in this case erroneously instructed jurors that they must *unanimously* agree that they have a reasonable doubt whether the murder was a greater or lesser offense before giving the defendant the benefit of that doubt. By requiring all twelve jurors to have a reasonable doubt regarding the greater offense before an individual juror could vote for the lesser offense, CALJIC Nos. 8.71 and 8.72 erroneously lowered the prosecution's burden of proof. The State, however, contends that the jury, viewing the instructions as a whole, would not have applied an improper burden of proof while making its guilt determinations. The State further contends that even if instructing with the flawed versions of CALJIC Nos. 8.71 and 8.72 was error, the error could not have affected the verdict and was harmless. Notwithstanding the Court's recent decision in *People v. Salazar* (2016) 63 Cal.4th 214, rejecting a similar claim, the trial court's giving the flawed versions of CALJIC Nos. 8.71 and 8.72 constituted reversible error for the reasons articulated in appellant's opening brief and below.

**A. This Claim Is Cognizable On Appeal**

This Court in *People v. Moore* (2011) 51 Cal.4th 386, 410 (hereafter “*Moore*”), found a similar appellate claim cognizable even where defense counsel did not object and had requested that the trial court give CALJIC No. 8.71. The State, however, contends that this issue is forfeited on appeal because Mitchell failed to object below to CALJIC Nos. 8.71 and 8.72, or to request a clarifying or amplifying instruction in the trial court. (RB 22-23.) The State relies on cases where the instruction was a correct statement of the law without potential for confusing the jury (RB 23, citing *People v. Bolin* (1998) 18 Cal.4th 297, 327, and *People v. Johnson* (1993) 6 Cal.4th 1, 52), which is not the situation in this case. Mitchell’s claim is cognizable on appeal for the very reason the State acknowledges, the asserted error affected his substantial rights. Penal Code section 1259 exempts jury instruction claims affecting appellant’s substantial rights from the customary rules relating to forfeiture by failure to object, and thus the State’s forfeiture argument is without merit. (See *People v. Casares* (2016) 62 Cal.4th 808, 831 [reaching instructional claim that there was a reasonable likelihood the jury understood the instructions in a way that undermined the requirement of proof beyond a reasonable doubt despite defendant’s failure to object]; *People v. Rundle* (2008) 43 Cal.4th 76, 148-149 [addressing ambiguous instruction claim where there was no objection], overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421; *People v. Kelly* (2007) 42 Cal.4th 763, 791 [addressing instructional claim where no objection or request for clarification].)



**B. The Delivery Of CALJIC Nos. 8.71 And 8.72,  
Requiring Jurors To Unanimously Agree They Had  
A Reasonable Doubt As To The Nature Of The  
Crime Or The Degree Of Murder Before Appellant  
Was Entitled To The Benefit Of That Doubt,  
Violated Both State Law And The Federal  
Constitution**

In his opening brief, Mitchell challenges the trial court's instruction to the jurors with the 1996 revised versions of CALJIC Nos. 8.71 and 8.72. (AOB 49-85.) These versions contained a unanimity-of-doubt requirement that this Court in *People v. Moore, supra*, 51 Cal.4th at pp. 411-412, found potentially confusing to jurors about the role of their individual judgments in deciding between first and second degree murder and murder or manslaughter. (AOB 53-57.) Mitchell argues that in this case, where the jury was given the disapproved of unanimity-of-doubt language, the jury was essentially told that unless the doubt was shared by each and every juror, the duty to give the defendant the benefit of the doubt did not arise and was, in effect, negated. By negating the benefit-of-the-doubt principle, the instructions lowered the prosecution's burden of proof and undermined the proof beyond a reasonable doubt standard, thereby violating Mitchell's state and federal constitutional rights. (AOB 49-85.)

**1. There Is a Reasonable Likelihood That the  
Jurors Understood and Applied the  
Unanimity-of-Doubt Requirement, Which  
This Court Criticized As Problematic and  
Confusing in *People v. Moore* (2011) 51  
Cal.4th 386, in a Way That Violated State  
Law and the Federal Constitution**

Since this Court's decision in *Moore*, and the filing of Appellant's Opening Brief and Respondent's Brief, this Court addressed the same unanimity-of-doubt language in the 1996 revised versions of CALJIC Nos.

8.71 and 8.72 in *People v. Salazar* (2016) 63 Cal.4th 214 (hereafter “*Salazar*”). In *Salazar*, this Court acknowledged the advice in *Moore* that it is better practice not to use the 1996 revised versions of CALJIC Nos. 8.71 and 8.72 with the unanimity-of-doubt language, because it creates some potential for confusing jurors about the role of their individual judgements in deciding between the greater and lesser offenses. (*People v. Salazar, supra*, 63 Cal.4th at p. 246; RB 24-25.)<sup>1</sup> In fact, *Salazar* states that the unanimity-of-doubt language “may be confusing because it is unclear how the phrase ‘unanimously agree that you have a reasonable doubt’ applies to individual jurors’ views . . .” (*People v. Salazar, supra*, at p. 247.) Nevertheless, *Salazar* held that in that case, where the jury was instructed with CALJIC No. 17.40, CALJIC No. 8.74 and CALJIC No. 17.10, a reasonable juror, considering the instructions as a whole, “would have understood that these terms reflect the principle stated in CALJIC No. 17.10: ‘the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged crime.’” (*People v. Salazar, supra*, 63 Cal.4th at pp. 247-248, quoting *People v. Moore, supra*, 51 Cal.4th at p. 411.)

Appellant respectfully requests that this Court reconsider its decision in *Salazar* for two reasons. First, this Court in *Salazar*, in holding that the

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<sup>1</sup> Mitchell does not claim that the 1996 revised versions of CALJIC Nos. 8.71 and 8.72 are erroneous. (See *People v. Salazar, supra*, 63 Cal.4th at p. 246.) Rather, appellant’s argument is that based on the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72 and the other instructions given in the case, it is reasonably likely that the jury understood the unanimity-of-doubt language as preventing any individual juror from giving effect to any reasonable doubt as to the degree of the offense. (AOB 56-57.)

unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72 reflected the principle of CALJIC No. 17.10, essentially viewed CALJIC Nos. 8.71 and 8.72 as instructions regarding the order of returning verdicts. (*People v. Salazar, supra*, 63 Cal.4th at pp. 247-248.) CALJIC Nos. 8.71 and 8.72, however, directly address the role the reasonable doubt standard should play in the jury's deliberations as to the degree of the offense and not the requirement for returning a verdict on the lesser rather than the greater charged offense. By itself, the text of CALJIC Nos. 8.71 and 8.72 neither states nor implies that the unanimity-of-doubt requirement applies to the returning of verdicts. Instead, CALJIC Nos. 8.71 and 8.72 state the fundamental principle this Court set forth in *People v. Dewberry* (1959) 51 Cal.2d 548, 555: "[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense."

In light of the opinion in *Moore*, it is understandable that in *Salazar* this Court failed to distinguish instructing jurors on how to return verdicts from instructing jurors on what to do where a juror has a reasonable doubt as to what degree of offense was proved. In *Moore*, this Court found that inserting the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72 was unnecessary because CALJIC No. 8.75, an instruction on returning verdicts, explained that the jury must unanimously agree to not guilty verdicts on the greater homicide offense before the jury as a whole may return verdicts on the lesser offense. (*People v. Moore, supra*, 51 Cal.4th at pp. 411-412.) In so holding, *Moore* viewed CALJIC Nos. 8.71 and 8.72 as instructions on returning verdicts. In *Salazar*, this Court has done the same

in determining that an instruction on returning verdicts – CALJIC No. 17.10 – cleared up any potential confusion. Since CALJIC Nos. 8.71 and 8.72 are meant to convey what to do when any juror has a reasonable doubt as to degree of offense, and not to instruct on returning verdicts, as outlined in the opening brief and below on pages 8-12, the other instructions given to the jury in this case do not dispel the potential for confusion. (AOB 49-66.)

Second, this Court in *Salazar* failed in its analysis to take into account or apply well-settled law regarding general versus specific instructions. As outlined in Appellant’s Opening Brief, where two instructions are inconsistent, the more specific charge controls the general charge. (AOB 58-62.) Any specific instruction on how to deal with reasonable doubt as to the degree of offense would take precedence in guiding the jurors over general instructions on unanimity or reasonable doubt. (See *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878.) Thus, although the jury in this case was instructed with other general instructions, these other instructions would not have controlled the jury’s interpretation of CALJIC Nos. 8.71 and 8.72. For both of these reasons, this Court should reconsider its ruling in *Salazar*, return CALJIC Nos. 8.71 and 8.72 to their original purpose of instructing the jury that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense. Further, this Court should make clear that other instructions that address the order of returning verdicts do not cure the harm of the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72.

**2. The Other Instructions Did Not Correct the Constitutional Error Resulting From the Unanimity-of-Doubt Requirement in CALJIC Nos. 8.71 and 8.72**

Assuming this Court reconsiders its decision in *Salazar*, the other instructions – CALJIC Nos. 17.40, 8.50 and 8.74 – did not, contrary to the State’s contention, clarify the possible confusion stemming from instructing the jury in this case with the 1996 version of CALJIC Nos. 8.71 and 8.72. (RB 22-25.) Although the jurors in this case were instructed with CALJIC No. 17.40, as Mitchell has outlined in his opening brief, that instruction did not dispel the confusion created by the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72. (AOB 58-61.) The State’s argument to the contrary is based on the decision in *People v. Gunder* (2007) 151 Cal.App.4th 412. (RB 31.) In *Gunder*, finding no error in giving CALJIC No. 8.71 with the unanimity language, the Court of Appeal relied on the trial court’s having instructed with CALJIC No. 17.40 on individual opinion and CALJIC No. 8.75 on the procedure for returning verdicts. (*People v. Gunder, supra*, 151 Cal.App.4th at p. 425.) *Gunder* characterized CALJIC No. 17.40 as crucial in determining the reasonable likelihood of the jury misinterpreting CALJIC No. 8.71. *Gunder* reasoned that once the jury was instructed with CALJIC No. 17.40, a reasonable juror would view the statement about unanimity in CALJIC No. 8.71 in its “proper context” of the procedure for returning verdicts because the jurors were also instructed with CALJIC No. 8.75. (*People v. Gunder, supra*, at p. 425.)<sup>2</sup> Putting aside whether the court’s reasoning in *Gunder* is correct, the jury in this

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<sup>2</sup> The court in *Gunder* did not consider whether CALJIC No. 8.50 would have rectified the flaw in CALJIC No. 8.72.

case was not instructed with CALJIC No. 8.75. Thus, *Gunder* offers little support for the State's argument.

The State, following *Gunder*, claims that the crucial factor in determining whether the jury was confused by CALJIC Nos. 8.71 and 8.72 is whether the jurors were properly instructed as to their duty to make decisions individually. (RB 33.) CALJIC No. 17.40, the State asserts, ensured that this was properly understood. The State, however, fails to address the distinction between informing the jurors of their ability to make an individual decision (as CALJIC No. 17.40 does) and informing the jurors of an unanimity-of-doubt requirement. In other words, a juror can make a decision individually, but still believe that he or she is hamstrung by the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72 when deciding whether or how to give the defendant the benefit of the doubt in deciding the degree of the offense. Indeed, the court in *Gunder*, acknowledged that if it were reasonably likely that CALJIC No. 8.71 communicated the need for the procedural prerequisite of a unanimous finding of doubt as to degree (which it does), the instruction on the duty to deliberate individually would not refute this directly. (*People v. Gunder, supra*, 151 Cal.App.4th at p. 425.) Thus, CALJIC No. 17.40 given in this case did not dispel the confusion created by CALJIC Nos. 8.71 and 8.72.

The State's reliance on *People v. Pescador* (2004) 119 Cal.App.4th 252, 255 is also problematic. In *Pescador* the jury was instructed with CALJIC Nos. 17.11 and 8.50 in addition to CALJIC No. 8.71. (*People v. Pescador, supra*, 119 Cal.App.4th at p. 258.) Here, the jury was also instructed with CALJIC No. 8.50, but not CALJIC No. 17.11. Relying on *Pescador*, the State contends that CALJIC No. 8.50 dispelled any confusion by establishing the State's burden of proving that the killing was murder

and not manslaughter. (RB 32.) Reiterating to the jury that the prosecution had to prove each element beyond a reasonable doubt, however, did not clarify the confusing message given by the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72. A juror could understand that the prosecution must prove each element beyond a reasonable doubt, and yet still believe that the unanimity-of-doubt language precludes him or her from giving effect to his or her reasonable doubt as to first degree murder when other jurors do not share that doubt. Further, *Pescador*, although referencing CALJIC No. 8.50 in its conclusion that the challenged instructions (CALJIC Nos. 8.71 and 8.72) read together with other instructions given (CALJIC Nos. 17.11 and 8.50) would not likely have led jurors to believe they were required to vote for first degree murder if any of the other jurors found that charge proven, did not explain how CALJIC No. 8.50 was helpful in this regard.

Moreover, the State fails to address both *Pescador's* reliance on cases upholding the validity of CALJIC Nos. 8.71 and 8.72 that did not involve the 1996 revision with the problematic unanimity language (*People v. Pescador, supra*, 119 Cal.App.4th at p. 257; AOB 62-63), or that the decision offers no analysis for its conclusion that CALJIC Nos. 17.11 and 17.40 establish that the jury would not misunderstand the unanimity language and apply that language in an unconstitutional manner (AOB 63). Thus, the State's reliance on *Pescador*, like its reliance on *Gunder*, does not refute Mitchell's argument.<sup>3</sup>

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<sup>3</sup> In addition to its reliance on *Gunder* and *Pescador*, the State contends that this Court should follow *People v. Frye* (1998) 18 Cal.4th 894, in resolving this issue. The State, however, openly admits that the  
(continued...)

The State also contends that CALJIC No. 8.74 dispelled any potential confusion created by the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72. (RB 32.) CALJIC No. 8.74, however, failed to fix the problem because it did not address reasonable doubt – let alone an individual juror’s ability to give effect to her reasonable doubt even when no other juror agreed – and would have been understood by the jurors as stating the general unanimity principle for deciding the homicide offense. This was in contrast to CALJIC Nos. 8.71 and 8.72 which stated a specific limit for an individual juror in resolving doubts as to which offense or degree had been proved.

**C. The Delivery Of CALJIC Nos. 8.71 And 8.72 With The Unanimity-Of-Doubt Requirement Mandates Reversal Of Appellant’s Murder Convictions And Death Sentence**

In his opening brief, Mitchell explains that the error here is structural error, and in the alternative, reversal is required because the State cannot prove the errors harmless beyond a reasonable doubt.<sup>4</sup> The State, however,

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<sup>3</sup> (...continued)

version of the CALJIC instructions used in *Frye* did not contain the problematic language at issue in *Moore*. (RB 28-31.) Indeed, because the instructions in *Frye* did not contain the problematic unanimity-of-doubt language, *Frye* is inapplicable.

<sup>4</sup> As outlined in the opening brief, the unanimity-of-doubt language in CALJIC Nos. 8.71 and 8.72 subverted the reasonable doubt standard in a more tangible way than the terms “grave uncertainty” and “substantial doubt” in *Cage v. Louisiana* and *Sullivan v. Louisiana*. (*Cage v. Louisiana* (1990) 498 U.S. 39, 41; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277; AOB 66-73.) The consequences of this error are unquantifiable and indeterminate, thus, a harmless error analysis would require the Court to speculate about how the jurors applied the reasonable doubt standard, here

(continued...)



characterizes the error in this case as improperly describing or omitting an element of the offense, more akin to the instructional error addressed in *People v. Flood* (1998) 18 Cal.4th 470, 479-480. (RB 34.) In *Flood*, this Court held that an instructional error that improperly describes or omits an element of an offense generally is not a structural defect, but falls within trial error subject to *Chapman* review. (RB 34.) The State contends, however, that the error must be reviewed under the state prejudice standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, and, if the error is characterized as relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense, thus violating both the United States and California Constitutions, then it should be reviewed under the federal constitutional standard of prejudice, *Chapman v. California* (1967) 386 U.S. 18, 24. (RB 34.)

The prejudicial impact of the instructional error is fully set out in the opening brief. (AOB 74-84.) In analyzing prejudice under both the state and federal standard, the State contends that the instructional error could not have contributed to the verdict because there was no evidence “whatsoever” from which the jury could find Mitchell guilty of a lesser offense than first degree murder and any federal constitutional error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. (RB 34.) If, however, even one juror could have entertained a reasonable doubt that the homicides were committed with

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<sup>4</sup> (...continued)

tainted by the unanimity-of-doubt requirement in reaching the verdicts on counts 1-3. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 281.) As such, Mitchell argues the error is structural. Because respondent does not add to the discussion of structural error, this issue is joined and no further reply to respondent on this issue is necessary.

premeditation and deliberation, but was prevented from giving effect to that doubt by the unanimity-of-doubt language, it thus impacted the verdict on the degree of murder and the error is prejudicial. As outlined in more detail in the opening brief and incorporated here, Mitchell contends that at least one juror could have had such a doubt based on the evidence presented. (AOB 75-84.)

The State's prejudice analysis lists evidence supporting the jury's verdict, but does not address the evidence raised by Mitchell that could have reasonably left room for doubt. If properly instructed, at least one juror could have considered and had a reasonable doubt that the homicides were committed with first degree premeditation and deliberation. The State asserts that Mitchell carried out his revenge at the CAS dealership in a premeditated and deliberate manner. (RB 35.) Nonetheless, there was evidence from which a juror could have had a reasonable doubt as to whether Mitchell acted with premeditation and deliberation: (1) there was no evidence that Mitchell arrived at the car dealership with a preexisting plan to shoot or kill anyone; (2) there was conflicting evidence about motive, whether Mitchell was angry with Small or angry with the CAS dealership; and (3) there was evidence that Mitchell may have felt provoked.<sup>5</sup>

The prosecutor's theory was that Mitchell premeditated and deliberated the murders and attempted murders at CAS as demonstrated by motive and method: feeling "wronged by" the people at the car dealership (13 RT 2434), and bringing a weapon to the dealership and multiple

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<sup>5</sup> The jury was instructed with the provocation instruction CALJIC No. 8.42. (65 CT 17,272-17,273.)

gunshots at the scene. (13 RT 2431-2433.)<sup>6</sup> According to the prosecutor, Mitchell's motive in the CAS dealership murders and attempted murders was his belief that the dealership had "screwed them over" (10 RT 2046), but the evidence whether Mitchell knew the car had broken down when he entered CAS that afternoon was unclear. Small testified that she did not have a cell phone at the dealership to inform Mitchell of the car breaking down. (7 RT 1315, 1341.) Small did call her son Kenrod from the dealership's phone and tell him she did not have the Durango she had just purchased and that she was on the way home. (6 RT 1244.) Once Small returned home, she discovered the cell phone that Mitchell used was at her apartment and not with Mitchell. (7 RT 1343.) Small testified that she only talked with Mitchell later in the afternoon when she received a call from him before she took her children to the park, which it turned out was after the murders at the CAS dealership. (7 RT 1354.) During that conversation Mitchell told her he was coming home. He did not mention the homicides and attempted homicides at CAS, and she did not remember if she told Mitchell about the car breaking down. (7 RT 1354-1355.) Without knowing that the car had broken down, giving Mitchell a motive to plan the murders and attempted murders, a reasonable juror could have doubt as to whether Mitchell arrived at the CAS dealership with a pre-existing plan to kill.

Even if Mitchell did believe the car dealership "screwed them over" (10 RT 2047), there was evidence that he was not upset about the situation, again casting doubt on a pre-existing plan to kill and thus whether Mitchell

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<sup>6</sup> Appellant's Opening Brief addresses in detail how Mitchell's normal habit of carrying a weapon and the imprecise nature of the shooting cast doubt on premeditation and deliberation. (AOB 77-80.)